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Supreme Court, U.S.
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No. 96-498

In The

Supreme Court of the United States

October Term, 1996

JOHN M. HEIN; MERLENE HEIN,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION; BURTON MCNEIL, acting as HOWARD SAVINGS BANK PENSION PLAN ADMINISTRATOR AND HOWARD SAVINGS BANK PENSION PLAN;

Burton McNeil and the Retirement Plan of The Howard Savings Bank,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the anti-cutback provision in Section 204(g) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1054(g), mandate that Petitioner be credited with post-termination service for purposes of "growing into" unreduced early retirement benefits, where Petitioner was not entitled to those benefits under the unambiguous terms of the Plan and no amendment of the Plan has cut back benefits?

The question presented by Petitioner is inapposite. First, this case does not arise from a corporate restructuring. Instead, The Howard Savings Bank was closed by the State of New Jersey, and the Federal Deposit Insurance Corporation was appointed receiver. As a result, Petitioner ceased to be employed by the Bank prior to meeting the requirements for unreduced early retirement benefit from the Plan. Second, Petitioner's assertion that the benefits he seeks were "fully-funded" is devoid of support in the record. The Plan's funded status was not addressed by the district court.

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STATUTORY PROVISIONS

Section 204(g) of ERISA, 29 U.S.C. § 1054(g), provides as follows (with added emphasis):

> (g) ***Decrease of accrued benefits through amendment of plan***
>
> (1) The accrued benefit of a participant under a plan may not be decreased by an *amendment of the plan,* other than an amendment described in section 1082(c)(8) or 1441 of this title.
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of –
>
> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. *In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy.* The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

COUNTERSTATEMENT OF THE CASE

This case was brought under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001-1461, to recover early retirement benefits allegedly due under the Retirement Plan of The Howard Savings Bank (the "Plan"). The Plan is a qualified defined benefit pension plan sponsored by The Howard Savings Bank ("Bank"). Petitioner John Hein[1] was born on December 26, 1937. He became an employee of the Bank (or its predecessor) on September 19, 1955 and commenced participation in the Plan soon thereafter.[2]

The Plan provides a fixed retirement benefit defined as a monthly benefit commencing at normal retirement age (generally age 65). The Plan further provides an "unreduced early retirement benefit" for participants who both (1) terminate employment after attaining their fifty-fifth birthday and earning ten years of service, and (2) have a combined age and years of service at termination equal to or exceeding 90. This benefit is more valuable than the Plan's normal retirement benefit, because payments may commence as early as age 55 without being reduced to reflect the fact that payments will be made over a longer life-span.

---

[1] Throughout this brief, Petitioners John and Merlene Hein will be referred to, both collectively and individually, as "Petitioner" or "Hein."

[2] The facts set forth herein are derived from the opinions of the district court, App. 28a-38a, and the court of appeals, App. 1a-27a.

On October 2, 1992, the Bank was closed and the Federal Deposit Insurance Corporation ("FDIC") was appointed receiver. Petitioner and other former Bank employees were immediately notified that their employment with the Bank had been terminated. By Purchase and Assumption Agreement entered into on the same day, the FDIC as Receiver sold certain of the Bank's assets, and transferred certain of its liabilities, to First Fidelity Bancorporation ("First Fidelity"). First Fidelity did not assume any obligations with respect to the Plan. Petitioner was hired by First Fidelity and remained in its employ until December 31, 1992.

Petitioner's employment with the Bank terminated shortly before he attained age 55. Although he did not meet the applicable age requirement at the time of his termination, Petitioner sought an unreduced early retirement benefit from the Plan.

REASONS FOR DENYING THE WRIT

I. PETITIONER WAS NOT ENTITLED TO UNREDUCED EARLY RETIREMENT BENEFITS UNDER THE UNAMBIGUOUS PROVISIONS OF THE PLAN

Petitioner claims that the denial of his unreduced early retirement benefits is contrary to the express provisions of the Plan. Pet. 17-23. Two courts have now looked at this claim and concluded that Petitioner was *not* entitled to unreduced early retirement benefits under the unambiguous terms of the Plan. As the district court held:

> Under the plain language of the Plan itself, Mr. Hein does not qualify for unreduced benefits because he did not reach one of the specific qualifying combinations of age and years of service. The table set forth in the Plan is not offered as an illustration of qualifying combinations, but rather as an exhaustive list of those combinations.

App. 34a. The Third Circuit arrived at precisely the same conclusion in its interpretation of the Plan:

> First Fidelity is neither an affiliate nor a subsidiary of The Howard Savings Bank. Hein could not, therefore, satisfy the requirements of the Plan after the asset sale to First Fidelity; when he reached age fifty-five he was no longer an "Employee" of the "Bank" as required by the Plan.

App. 10a (footnote omitted).

Petitioner now asks the Supreme Court to review the specific terms of the Plan document and the summary plan description ("SPD") for the Plan, in order to reverse the reasonable contractual interpretation agreed to by the district court and the court of appeals. Yet this Court has specifically cautioned that "we do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.). Certiorari is even less appropriate where both the district court and the court of appeals are in agreement regarding the correct contractual interpretation. As the Court has often held, "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of

a very obvious and exceptional showing of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

In any case, the contractual interpretation urged in the Petition – that Petitioner is entitled to an unreduced pension based on Plan § VIII(6) (relating to termination *before* retirement) and the SPD – is not properly before the Court. This convoluted argument was first proffered by Petitioner at oral argument to the court of appeals, and the court allowed Petitioner to file a supplemental letter brief after the argument to clarify his position on interpretation of the Plan. Although Respondents urged the court to decline to consider arguments not raised before the district court, Resp't App. 1a, it is clear that the court both considered and rejected them. App. 10a. Because Petitioner failed to raise this contractual interpretation argument before the district court or in any brief prior to oral argument, the court of appeals should have declined to hear it, and this Court should decline to hear it as well.

Petitioner's proffered interpretation of the Plan is wrong in any case, for the reasons set forth in the letter brief filed by Respondents with the court of appeals on December 27, 1995 and reproduced in the Appendix to this brief at 1a.

II. PETITIONER DOES NOT RAISE AN ISSUE OF IMPORTANCE CONCERNING THE APPLICATION OF SECTION 204(g) OF ERISA

Both the district court and the court of appeals correctly determined that Petitioner did not meet the

requirements for an unreduced early retirement benefit under the terms of the Plan, because his employment terminated prior to his attaining age 55. Because Petitioner did not qualify under the terms of the Plan, the major question presented in the Petition is whether Section 204(g) of ERISA, 29 U.S.C. § 1054(g), supplants the provisions of the Plan by requiring the Plan to recognize Petitioner's post-termination service with First Fidelity. Petitioner does not raise a question of exceptional importance regarding ERISA Section 204(g).

A. ERISA's Anti-Cutback Rule Does Not Apply In The Absence Of A Plan Amendment Or Where The Participant Has Not Satisfied The Conditions For Receiving The Protected Benefit

As the caption to the provision plainly states, Section 204(g) of ERISA governs a "decrease of accrued benefits through amendment of [a] plan." In pertinent part, it states that the "accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." 29 U.S.C. § 1054(g)(1). The prohibition applies to a "retirement-type subsidy," including an early retirement subsidy, only "with respect to a participant who satisfies (either before or after the amendment) the pre-amendment conditions for the subsidy." 29 U.S.C. § 1054(g)(2).

Thus, the text of ERISA's anti-cutback rule clearly establishes that it applies to a retirement-type subsidy only if: (1) an amendment of the plan has occurred, *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1561 (D.C. Cir.), *cert. denied*, 469 U.S. 834 (1984) ("Congress did *not* state that any change would trigger [Section

204(g)]; it stated that any change *by amendment* would do so."); and (2) the participant satisfies the pre-amendment conditions for the subsidy, *Adams v. LTV Steel Mining Co.*, 936 F.2d 368, 370-71 (8th Cir. 1991), *cert. denied*, 502 U.S. 1073 (1992) (Section 204(g) inapplicable where employees did not satisfy requirements for early retirement benefits); *Harms v. Cavenham Forest Indus., Inc.*, 984 F.2d 686, 692 (5th Cir.), *cert. denied*, 510 U.S. 944 (1993).

Here, neither of these requirements is satisfied. No amendment of the Plan is at issue, and Petitioner had not attained age 55 on his "Actual Retirement Date" as required under the terms of the Plan. Plan § V(5), App. 61a. Instead, Petitioner's employment with the Bank terminated before his 55th birthday, when the Bank was closed by the Commissioner of Banking of the State of New Jersey. Although Petitioner continued to work for First Fidelity, First Fidelity was unrelated to the Bank and was not a participating employer in the Plan. Petitioner was therefore unable to meet the Plan's unambiguous requirements for unreduced early retirement benefits. Under these facts, it is clear that the anti-cutback rule in Section 204(g) of ERISA does not apply.

B. There Is No Conflict Of Authority Among The Courts Of Appeals Regarding Application Of ERISA's Anti-Cutback Rule To The Facts At Issue

Three courts of appeals have squarely addressed whether a participant whose job transfers as part of the sale of a division or subsidiary is entitled to "grow into" early retirement benefits under the seller's retirement

plan based upon service with the buyer. Each of these courts rejected the contention that ERISA's anti-cutback rule applies so as to require the seller's plan to recognize service with the buyer where the plan (or its assets) was not transferred as part of the transaction.

Plaintiffs in *Andes v. Ford Motor Co.*, 70 F.3d 1332 (D.C. Cir. 1995), were employees of Dealer Computer Services (DCS), a subsidiary of Ford Motor Company. When Ford sold DCS, employees who continued to work for DCS ceased to be able to earn years of service for purposes of becoming eligible for early retirement benefits under Ford's qualified retirement plan. The Court of Appeals for the District of Columbia Circuit explicitly rejected the argument Petitioner now advances here, holding that Section 204(g) of ERISA does not apply where there is no "amendment of the plan" as specifically required by the statutory language:

> As a result of the numerous compromises between powerful competing interest groups that ERISA embodies, the length of the legislative process that lead [sic] to its enactment, its detail, and complexity, the [Supreme] Court has placed particular importance on the statutory text. *See Mertens* [*v. Hewitt Assoc.*, 113 S. Ct. 2063, 2071 (1993).] Reliance on free-floating notions of the "purposes" of ERISA is not an acceptable method of statutory interpretation.

70 F.3d at 1335 (footnote omitted).

In *Hunger v. AB*, 12 F.3d 118 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2676 (1994), plaintiffs were employees in the Engine Parts Division of Clevite Industries and participants in a defined benefit plan sponsored by Clevite.

The plan contained a heavily subsidized early retirement benefit for participants who terminated employment after attaining age 55 with ten or more years of service. When Clevite sold the assets of its Engine Parts Division to JPI Merger, Inc., the plaintiffs terminated employment with Clevite and continued to work in their same positions with JPI.

The Eighth Circuit held that the anti-cutback provision in ERISA was not implicated by the fact that plaintiffs' service with JPI was not recognized under the Clevite plan:

> First, because the appellants were never entitled to apply employment with a successor company to their age and service requirements under the original terms of the Plan, there was no amendment to the Plan . . . and the protection of section 204(g) does not come into play. Second, . . . [b]ecause the appellants are no longer employed by Clevite, as expressly required by the conditions of the Plan, they are unable to satisfy the pre-amendment eligibility conditions and section 204(g) will not serve to preserve their entitlement to the early retirement subsidy.

12 F.3d at 121.

Dade v. North American Phillips Corp., 68 F.3d 1558 (3d Cir. 1995), is similar. The dispute in *Dade* arose from the sale of the Magnavox Division of North American Phillips Corporation to MESC Electronics Systems, Inc. Plaintiffs were employees of the Magnavox Division and, until the sale occurred, participants in a pension plan maintained by Philips. Similar to the Plan, the Phillips plan permitted a participant to retire at or after age 55

with an unreduced retirement benefit if the sum of the participant's age and years of service was at least 85. Plaintiffs, who became employees of MESC after the sale, found themselves unable to meet the eligibility requirements for an unreduced early retirement benefit.

The Court of Appeals for the Third Circuit held that Section 204(g) of ERISA could have no application under the facts presented, because "there has been no amendment to the Plan that reduced a benefit, accrued or otherwise." *Id.* at 1562. Instead, the court recognized that the denial of benefits "resulted from the fact that plaintiffs could not satisfy the preamendment, pre-sale conditions for the Rule of 85 retirement-type subsidy as originally written." *Id.*

Petitioner's attempt to distinguish *Dade* from this case is unavailing. Pet. 26-29. Petitioner suggests that, "had the Bank laid off John Hein immediately before the seizure of the Bank by the FDIC, he would have been entitled to a credit of up to 501 hours, well in excess of the number of hours McNeil [then administrator of the Plan] alleged were necessary under his interpretation of the Plan." Pet. 28. This is simply wrong. Petitioner was not entitled to unreduced early retirement benefits because he had not attained age 55 when his employment with the Bank terminated, not because he lacked sufficient service. Petitioner would have been no closer to age 55 when the Bank closed and his employment terminated had he been laid off immediately before the closure. Petitioner's analogy fails in any event, since additional hours of service are credited under the Plan only with respect to a *paid* layoff. Plan § I(15), App. 50a-51a.

Petitioner also seeks to distinguish this Plan from the plan in *Dade* on the basis that the *Dade* plan explicitly excluded service with an entity "prior to the date it becomes an Employer" or "after it ceases to be an Employer or Affiliate." It is equally clear, however, that the Plan does not cover hours of service for entities unrelated to the Bank. *Id.*

Petitioner relies on *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137 (3d Cir. 1994), *cert. denied*, 114 S. Ct. 1369 (1994), to support his contention that Section 204(g) of ERISA overrides the Plan document so as to entitle him to unreduced early retirement benefits. The plaintiffs in *Gillis* were participants in a defined benefit plan sponsored by Hoechst Celanese Corporation. When Hoechst sold its PVC Division to the American Mirrex Corporation, the plaintiffs terminated their employment with Hoechst and continued to work in their same positions with the acquirer.

Hoechst also transferred pension assets to American Mirrex on behalf of the plaintiffs. Plaintiffs claimed that Hoechst violated Section 208 of ERISA, 29 U.S.C. § 1058, because the amount transferred did not reflect the possibility that plaintiffs could grow into the "rule of 85" early retirement benefit in the Hoechst plan.[3] In a divided

---

[3] Under Section 208, a pension plan may not transfer assets or liabilities to another plan, unless each participant in the plan would (if the transferee plan then terminated) receive a benefit immediately after the transfer which is at least equal to the benefit he or she would have been entitled to receive immediately before the transfer (had the transferor plan then terminated).

opinion, the Court of Appeals for the Third Circuit held that Hoechst was required to transfer assets with respect to the subsidized benefit.

The Third Circuit has since twice addressed the intended scope of *Gillis*. In *Dade*, and again in this case, the court made it clear that *Gillis* does not apply where no transfer of plan assets or liabilities has occurred. *Dade*, 68 F.3d at 1563; App. 15a. Thus, there is no conflict between this case and *Gillis*, and even if there were, it would not be a sufficient basis for granting a writ of certiorari. *See Davis v. United States*, 417 U.S. 333, 340 (1974). Likewise, there is no conflict between the circuits, and no ambiguity in the language of Section 204(g) of ERISA, requiring clarification by this Court.

III. PETITIONER DOES NOT RAISE AN IMPORTANT POLICY ISSUE

Petitioner argues at length that a judicial extension of ERISA's anti-cutback rule is necessary in the "current landscape of corporate America . . . filled with mergers, acquisitions, and work-force reductions." Pet. 8-14. However dubious Petitioner's policy argument is, it does not apply here. Petitioner lost his job because the Bank was closed by the Commissioner of Banking of the State of New Jersey, and the FDIC was appointed receiver. In this capacity, the FDIC has a fiduciary obligation *to claimants against the insured depository institution*. 12 U.S.C. § 1823(d)(3)(C). In determining how to fulfill its statutory obligations of liquidating the assets of an insolvent financial institution and providing insurance of accounts, the FDIC is enjoined by statute to select the least-cost method

of resolving the institution. 12 U.S.C. § 1823(c)(4). Whatever policy considerations may otherwise apply where a business *voluntarily* chooses to spin off or divest itself of a business, those considerations cannot overcome the policies explicitly established by Congress governing resolution of an insolvent financial institution.

In any case, ERISA is not silent about how retirement benefits are treated in a merger or acquisition transaction. Section 210(b) of ERISA, 29 U.S.C. § 1060(b)(1), states that "in any case in which the employer maintains a plan of a predecessor employer, service for such predecessor shall be treated as service for the employer." Had Congress intended the obverse – that service for the successor must be treated as service for the predecessor where the successor does not maintain the predecessor's plan – it would have said so.

Finally, Petitioner is simply wrong when he predicts that "[c]orporate transactions will inevitably be structured to avoid continuation of corporate benefits contrary to the letter and the spirit of ERISA." Pet. 14. Section 510 of ERISA, 29 U.S.C. § 1140, makes it unlawful for any person to discharge or otherwise discriminate against a participant or beneficiary for the purpose of interfering with the attainment of any right to which he or she may become entitled under the plan. *See Andes v. Ford Motor Co.*, 70 F.3d at 1338, (plaintiff can establish section 510 violation "by showing that some ERISA-related characteristics special to the unit [were] essential to the firm's selecting the unit for closure or sale"); *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987) (company's decision to close down production line constituted violation of section 510).

CONCLUSION

For the reasons set forth above, we urge the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

LETTERHEAD OF SEYFARTH, SHAW,
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828-3585

December 27, 1995

VIA FEDERAL EXPRESS

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Re: Hein v. Federal Deposit Insurance Corporation, et al. Nos. 94-5641 and 95-5181

To the Honorable Court:

On behalf of Appellants Burton McNeil and the Retirement Plan of The Howard Savings Bank, we submit this letter in response to the letter of B. John Pendleton, Jr., dated December 19, 1995.

Introduction

At oral argument on December 12, 1995, the Court gave counsel for Appellees seven days in which to provide supplemental authority to support his argument as to how certain provisions of the Retirement Plan of The Howard Savings Bank (the "Plan") and the Summary Plan Description ("SPD") should be interpreted. In response to that limited directive, counsel has submitted what is essentially a new brief, raising entirely new arguments that were never presented to the district court and never raised in Appellees' prior submissions to this Court.[1]

This Court should decline to consider these new arguments. In any event, nothing contained in Appellees' Letter Brief changes the outcome of this case. The language of the Plan document, which is controlling, clearly demonstrates that Appellee John Hein ("Hein") is not entitled to unreduced early retirement benefits.

Hein claims that he is entitled to early retirement benefits under the terms of the Plan, without regard to any subsequent service at First Fidelity.[2]

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[1] Counsel for Appellees has had ample opportunity to make the arguments that he now raises for the first time. In addition to his main brief, counsel submitted a 12-page letter to this Court on November 20, 1995, attempting to distinguish the Court's recent decision in *Dade v. North American Phillips Corp.*, 94-5446 (3d Cir. Nov. 1, 1995).

[2] It is clear, based upon the Court's decision in *Dade*, that service with an acquiring corporation is not taken into account in determining eligibility for early retirement benefits under the seller's plan, when no transfer of plan assets occurs. Hein's

It is uncontested that Hein terminated employment with The Howard Savings Bank (the "Bank") prior to his 55th birthday. He nevertheless argues that the Plan permits him to retire with unreduced early retirement benefits *after* termination from employment. Through selective quoting, and mismatching of provisions of the Plan and the SPD, Hein attempts to manufacture ambiguity where none exists, by confusing "retirement" with the date pension benefits commence. This letter will briefly restate how the unambiguous provisions of the Plan and the SPD govern this case.

Interpretation of the Plan

First, Section V of the Plan governs early retirement benefits. This section makes it clear that an employee must meet the requirements for early retirement benefits on or before the "Early Retirement Date," a date which may be different from the date benefits commence. Section V(5) states in part:

> (a) Any Member, upon written application- . . . may retire on the first day of any calendar month in which he attains his fifty-fifth (55th) birthday and ten (10) Years of Service herein termed "Early Retirement Date."
>
> (b) If a Member retires on his Early Retirement Date, (i) benefit accruals shall cease on his Early Retirement Date, and (ii) payments of Retirement Income shall commence, at the option of

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attempt to reargue this point at pages 13 through 16 of his Letter Brief is inappropriate and unconvincing.

> the Member, either (x) on his Normal Retirement Date . . . or (y) on the first day of any month coinciding with or following his Early Retirement Date [at a specified reduction].

Appendix ("App.") 36-37. The statement in Section V(5)(b)(i) that benefit accruals cease on the member's Early Retirement Date clearly contemplates that the member is actually in employment, accruing benefits, until his Early Retirement Date. The statement in Section V(5)(b)(ii), that payments may commence on the first day of any month coinciding with *or following* the Early Retirement Date, indicates that "retiring" for purposes of this Section V is different from, and is a prerequisite to, beginning benefit payments as of the first day of a later month. Thus, Hein could not "retire" for purposes of Section V after he left employment.

Second, the Plan clearly distinguishes between (1) a termination of employment *after* meeting the eligibility requirements for early retirement, addressed in Section V, and (2) termination of employment *before* meeting those requirements, addressed in Section XI. Section XI of the Plan, entitled "Termination of Service," states in part:

> (1) If a Member's service terminates for any reason other than his death or retirement, no further benefits shall be accrued by such member.

App. 51. This is precisely what happened to Hein: His service terminated other than by his death or retirement. Section VIII(6) addresses the payment of benefits to participants in this circumstance:

> If a Member with vested rights attributable to contributions by the Bank under this Plan separates from the service of the Bank *prior to satisfying the age requirement for early retirement benefits*, as set forth in Paragraph (5)(a) of Section V hereof, such Member shall, upon attaining the age requirements for receiving such early retirement benefits, be entitled to elect to have payments made to him on and after meeting such age requirements in an amount equal to the benefits he would have received at normal retirement age, actuarially reduced.

App. 45 (emphasis added). There is no ambiguity here. This section clearly describes Hein and equally clearly requires that his benefits be actuarially reduced.[3]

Third, even if one assumes, with Hein, that the early retirement provisions in Section V apply to a member whose employment terminates before his Early Retirement Date, it is unquestionable that the *unreduced* benefits

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[3] Hein assumes that the actuarial reduction factors applicable to vested members who do not meet the requirements for early retirement are the same as those for early retirees. He then jumps to the conclusion that an individual who has not met the requirements for early retirement could become eligible for an *unreduced* early retirement benefit. Hein did not raise either of these arguments before the district court or in earlier filings before this Court and is therefore barred from raising them now. *See infra* at 6. We note, however, that nothing in the Plan supports Hein's argument. Rather, the Plan contains a separate definition of "Actuarial Equivalent" which applies. Plan § I(3), App. 25. It is, in any event, inconceivable that the words "actuarially reduced" in Section VIII(6) can be interpreted to include a reference to *unreduced* benefits in Section V(5).

which Hein claims do not. The unreduced early retirement benefits in the Plan apply only "if the Member has attained any combination of the ages and the years of Vesting Service, combinations set forth below on his Actual Retirement Date." Plan § V(5)(b), App. 37. The chart which is the real crux of this litigation follows:

Age on Actual Retirement Date	Vesting Service on Actual Retirement Date
55	35
56	34
* * *	* * *

Id. "Actual Retirement Date" is defined in the Plan as "the date on which the service of an Employee is terminated by retirement." Plan § I(2), App. 25. Here, Hein was not an "Employee" of the Bank at age 55.[4]

The argument in Hein's Letter Brief (at pp. 7-8) that the use of the word "Member" earlier in Section V(5) is inconsistent with the use of "Actual Retirement Date" in the chart is inexplicable. Section V(5) uses the word "Member" because a *former* employee who has retired early may elect to commence receiving benefits as of the first day of any month coincident with or following his Early Retirement Date. That is entirely consistent with

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[4] "Employee" mean [sic] a person employed by the Bank. Plan § I(12), App. 26. Similarly, "service" can refer only to service for purposes of the Plan, and only service with the Bank is credited under the Plan. Plan § I(15), App. 27. As noted at footnote 2, Hein's subsequent service with First Fidelity is not taken into account for this purpose.

requiring that the "Member" meet the eligibility requirements for an unreduced early retirement benefit while in employment.

As the district court stated in its opinion:

> Under the plain language of the Plan itself, Mr. Hein does not qualify for unreduced benefits because he did not reach one of the specific qualifying combinations of age and years of service. The table set forth in the Plan is not offered as an illustration of qualifying combinations, but rather as an exhaustive list of those combinations. Under the language of the Plan itself, Mr. Hein did not qualify for unreduced retirement benefits.

Attach. to Br. of Appellants, p. 8.

Interpretation of the SPD

Hein devotes a significant portion of his Letter Brief attempting to establish an entitlement to benefits under the SPD, rather than the Plan, but that is not the subject of this appeal. As this Court has repeatedly recognized, the Employee Retirement Income Security Act of 1974 ("ERISA") does not provide an action for benefits under a summary plan description where an operative plan document controls. *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1142 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1369 (1994) ("[W]e conclude that, under ERISA, these documents were, at most, summary plan descriptions. Accordingly, the plan document . . . controls and the plaintiffs 'cannot recover under 29 U.S.C. § 1132(a)(1)(b) [of ERISA] for benefits allegedly due under a summary plan description.' " (quoting *Gridley*)); *Gridley v. Cleveland Pneumatic*

Co., 924 F.2d 1310, 1318 (3d Cir.), *cert. denied*, 111 S. Ct. 2856 (1991). Because the Plan document clearly indicates that Hein's benefit must be actuarially reduced, it is of no moment to this appeal whether or not the SPD is similarly clear.

In any event, the SPD is clear. Like the Plan, the SPD differentiates between **"Your Early Retirement Benefit"** (App. 92-93) and what happens **"If You Leave The Bank Before Retiring"** (App. 93-94). In defining "Early Retirement," the SPD states:

> You become eligible for early retirement when you reach age 55 and complete 10 years of vesting service. . . . You can begin to receive retirement benefits on the first of the month coincident with your retirement or delay receipt of benefits until the first day of any following month.

App. 88. Hein did not fall within this definition. Instead, Hein left the Bank before retiring, when the Bank entered receivership.

With respect to employees who leave the Bank before retirement, the SPD states in part:

> Not every employee will spend his or her entire career with the Bank. If you leave the Bank before retiring, you may still be entitled to receive a pension under the Plan's vesting provision. . . .
>
> Pension payments begin the first day of the month after your 65th birthday. However, if you have ten years of vesting service . . . you may choose to receive your pension as early as the first of the month after your 55th birthday. If

> you choose to receive your pension early, it will be reduced in the same manner as an early retirement benefit.

App. 93-94. This provision, like the early retirement provision quoted above, clearly distinguishes between an employee who leaves the Bank at retirement and one who leaves the Bank with a vested benefit prior to retirement.

Hein seeks to read the statement that a vested benefit commencing at age 55 "will be reduced in the same manner as an early retirement benefit" as incorporating the specific reduction factors that apply to early retirement benefits. Hein did not make this argument in his appeal to the Plan, or before the district court, or in any filing before this Court. He is barred from raising it now. *Hutchins v. Internal Revenue Serv.*, 67 F.3d 40, 45 (3d Cir. 1995); *Toyota Indus. Trucks U.S.A., Inc. v. Citizens Nat'l Bank of Evans City*, 611 F.2d 465, 470 (3d Cir. 1979); *Newark Morning Ledger Co. v. United States*, 539 F.2d 929, 932 (3d Cir. 1976).

The argument is, nonetheless, no help to him. Like the Plan, the SPD clearly indicates that unreduced early retirement benefits apply only to a participant who retired from the Bank upon or after retaining age 55:

> However, the Bank provides an important benefit to early retirees. This reduction does not take effect if at retirement you have a certain minimum number of years of vesting service, given your age, as shown.

App. 92. The SPD then produces a chart, similar to that in the Plan, showing the minimum "Age at Retirement" as age 55. App. 93. This "important benefit to early retirees"

did not apply to Hein, because he did not retire, and his age at retirement was not 55. A statement that vested benefits will be *reduced* in the same manner as an early retirement benefit cannot mean that the benefit will be *unreduced* in contravention to the directly applicable provision of the SPD.

Standard of Interpretation

Hein invites the Court to employ the doctrine of *contra proferentum* to resolve an alleged ambiguity in the Plan and SPD. Hein Letter Brief 10-12. In the case Hein relies on, *Heasley v. Belden & Blake Corp.*, 2 F.3d 1249 (3d Cir. 1993), the Court applied *contra proferentum* to resolve whether the plan at issue gave the plan administrator discretion to interpret the plan, only after finding that "both the Plan and the evidence are ambiguous regarding discretion. . . . " 2 F.3d at 1257. Here, as the district court found, the plain language of the Plan makes the doctrine inapplicable.

In any case, the Court in *Heasley* addressed an insurance policy underlying an ERISA plan, and the presence of insurance was key to the Court's holding. Thus, the Court relied upon the reasoning of the Ninth Circuit decision in *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 540 (9th Cir.), *cert denied*, 498 U.S. 1013 (1990):

> Insurance policies are almost always drafted by specialists employed by the insurer. In light [sic] the drafter's expertise and experience, the insurer should be expected to set forth any limitations on its liability clearly enough. . . .

This Court found the *Kunin* reasoning "especially convincing where, as here, an insured employee seeks contractual benefits under ERISA," and explicitly limited its holding to *insured* ERISA plans. 2 F.3d at 1257. After *Heasley* was decided, the Ninth Circuit expressly rejected the argument Hein raises here:

> We hold that the rule of *contra proferentum* is not applicable to self-funded ERISA plans that bestow explicit discretionary authority upon an administrator to determine eligibility for benefits or to construe the terms of the plan.

Winters v. Costco Wholesale Corp., 49 F.3d 550, 554 (9th Cir. 1995).

In other words, if the ERISA plans [sic] provides its own principle of interpretation, the doctrine of *contra proferentum* cannot apply. *Id.* In this case, the Plan states:

> Except as herein otherwise expressly provided, the Committee shall have the right to interpret the Plan and to decide any and all matters arising thereunder or in connection with the administration of the Plan, including, but not limited to, the determination of any Employee's eligibility and the size and form of a Participant's benefits.

Plan § XII(7), App. 54. The doctrine of *contra proferentum* cannot apply without entirely abrogating this unambiguous grant of discretion.[5]

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[5] Hein has asserted that McNeil was not properly appointed to act as Plan administrator in lieu of the "Committee" under the Plan. He did not raise this argument before the district court and is therefore foreclosed from raising

In sum, the district court correctly decided that Hein was not entitled to unreduced early retirement benefits under the Plan. Its reliance upon the "same desk rule" reasoning in *Gillis* was in error. Many of the arguments Hein has raised in his Letter Brief are entirely new and must be disregarded. McNeil properly interpreted the Plan in denying Hein's claim for unreduced early retirement benefits. Accordingly, we respectfully request that the decision of the district court be reversed.

Very truly yours,

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON

FREDRIC S. SINGERMAN
CHRISTOPHER A. WEALS

cc: P. Douglas Sisk, Clerk (Federal Express)
Kevin M. Hart, Esq. (Regular Mail)
Edward R. McMahon (Regular Mail)
B. John Pendleton, Jr. (Federal Express)

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it now. *Supra* at 6. In fact, it was undisputed below that McNeil was appointed plan administrator for the Plan. Plaintiffs' Brief in Opposition to the Motion for Summary Judgment on behalf of McNeil and the Plan and in Support of Plaintiffs' Cross-Motion for Summary Judgment, p. 12, ¶ 17. In any case, it appears that the district court applied a *de novo* standard here.